No. (1)

In The
Supreme Court of the United States

MUKUNDA DEV MUKHERJEE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was Petitioner denied his Sixth Amendment right to a jury trial, as applied, by the district court's application of the Sentencing Guidelines to impose a sentence of 328 years, rather than a sentence of 5 to 8 years as recommended by the Sentencing Guidelines based on the jury's factual findings, where the reasonableness of the sentence depended entirely upon conclusions reached by the district court judge and not facts found by the jury?

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The sentencing order of the district court, *United States v. Mukherjee*, No. 04CR50044-1, 2006 WL 3031667 (E.D. Mich. Oct. 23, 2006) (slip copy), is set forth in the Appendix at A-1. The judgment in *United States v. Mukherjee* , No. 04CR50044-1 (E.D. Mich. Oct. 26, 2006), sentencing the Petitioner to 328 years in prison, is set forth in the Appendix at A-15. The Court of Appeals' opinion, *United States v. Mukherjee*, No. 06-2412, 289 F. App'x 107, 2008 WL 3820689 (6th Cir. Aug. 14, 2008) (unpublished), affirming the judgment of conviction and the sentence is set forth in the Appendix at A-27. The order of the Court of Appeals denying Petitioner's petition for rehearing en banc, *United States v. Mukherjee*, No. 06-2412, 289 F. App'x 107, 2008 WL 3820689 (6th Cir. Jan. 6, 2009), is set forth in the Appendix at A-42.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed on August 14, 2008. The court's order denying a petition for rehearing en banc was filed on January 6, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

AMENDMENT VI—JURY TRIALS FOR CRIMES AND PROCEDURAL RIGHTS

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

18 U.S.C. § 3553(a) provides:

> (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of

whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar

> records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

21 U.S.C. § 841(a)(1) provides, in pertinent part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

21 U.S.C. § 841(b)(1) provides, in pertinent part:

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

> . . . .
>
> [(1)](C) In the case of a controlled substance in schedule I or II, . . . such person shall be

> sentenced to a term of imprisonment of not more than 20 years . . . , a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.
> . . .
>
> [(1)](D) In the case of . . . any controlled substance in schedule III . . . , such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both.

21 U.S.C. § 841(b)(3) provides:

> In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an

individual or $250,000 if the defendant is other than an individual, or both.

U.S.S.G. § 2D1.1 cmt. 12 provides, in pertinent part:

> Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. *See* § 1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

U.S.S.G. § 3D1.1(a)(1) provides in pertinent part:

> (a) When a defendant has been convicted of more than one count, the court shall:
>
> > (1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups")

> by applying the rules specified in § 3D1.2.

U.S.S.G. § 3D1.2 provides in pertinent part:

> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
>
> > (a) When counts involve the same victim and the same act or transaction.
> >
> > (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
> >
> > (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
> >
> > (d) When the offense level is determined largely on the basis of the total amount of

> harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. § 5G1.2(d) provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

STATEMENT OF THE CASE

Petitioner, Mukunda Dev Mukherjee, is a medical doctor. He was born in India in 1942 and received his medical degree in England in 1966. In 1968, he moved to the United States and thereafter became a citizen of the United States. He practiced medicine, studied further, and taught medicine. Ultimately Petitioner opened a medical practice in an

economically distressed section of Flint, Michigan, where he began seeing largely uninsured patients with disabilities and pain management issues.

In June of 2004 Petitioner was indicted on fifty-three (53) charges of writing prescriptions for Schedule II, III, and V controlled substances without a legitimate medical purpose in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), (b)(1)(D), and (b)(3). The charges involved a period of time between April and June of 2004. Each count related to a single prescription for one medication. In addition, he was charged with one count of conspiring with his employee, Patricia Ann Garner, and her husband, Jason Kerry Garner, to distribute Schedule II, III, and V controlled substances without a legitimate purpose in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C), (b)(1)(D), and (b)(3). Mr. and Mrs. Garner were each charged individually with a single count of unlawfully distributing a Schedule III controlled substance without a legitimate medical purpose, as well as with conspiracy.

All of the transactions underlying the charges involved two undercover police officers and one paid police informant. The paid informant had been convicted of possession and delivery of drugs and false pretenses over $100. He was on parole at the time of the investigation. The controlled substances for which Petitioner was charged with writing unlawful prescriptions included Oxycontin, Vicodin, and cough syrup with codeine.

Mrs. Garner pleaded guilty to both charges against her and was sentenced to twenty-four (24)

months in custody and three years supervised release. Mr. Garner pleaded guilty to the unlawful distribution charge against him and was sentenced to six (6) months in custody and two (2) years supervised release. Petitioner exercised his right to a trial. The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

Prior to trial, the Government offered Petitioner a Rule 11 plea agreement with a recommended disposition on all charges of seven (7) years in custody. Following a jury trial, Petitioner was convicted of forty-four (44) of the distribution charges and acquitted of nine (9) distribution charges. He was also acquitted on the conspiracy charge. Of the forty-four counts for which Petitioner was convicted, twenty-four (24) involved postdated prescriptions. Petitioner was found guilty on all counts involving charges of postdated prescriptions. (At the time the prescriptions were written, it was the position of the Drug Enforcement Administration ("DEA") that a physician could prepare multiple prescriptions for Schedule II controlled substances on the same day with instructions to fill on different dates. However, the DEA retracted that position the month before the indictment was filed in this case. *See* Notices, Dispensing of Controlled Substances for the Treatment of Pain, 69 Fed. Reg. 67170, 67171 (Nov. 16, 2004).)

At the sentencing hearing, the Government agreed with Petitioner that, when grouping the various convicted offenses as required by U.S.S.G. §§ 3D1.1 and 3D1.2, the total amount of controlled substances for which Mukherjee was responsible based on

convicted conduct was equivalent to 98.29 kilograms of marijuana, yielding a base level offense of 24 pursuant to U.S.S.G. § 2D1.1(c)(8). However, the Government initially proposed a base offense level of 38, based on its position that Petitioner's punishment should not be limited to the quantity of drugs for which he was convicted, but that he should be punished for distributing the equivalent of 30,000 kilograms of marijuana, based on evidence not submitted to the jury. The district court found that, notwithstanding the fact that the jury verdict supported a base offense level of 24, the appropriate base offense level was 36, *see* U.S.S.G. § 2D1.1(c)(2), based upon the court's own conclusion that Petitioner was responsible for prescribing almost 300 times the amount of controlled substances than the jury convicted him of.

The district court's conclusion rested on statistical data obtained by the Government from the Michigan Automated Prescription System ("MAPS") on the total number of prescriptions for controlled substances allegedly written by Mukherjee between January 2003 and June 2004. The data from MAPS (a program just started in 2003) attributed to Petitioner prescriptions for controlled substances in an amount equivalent to 35,262.549 kilograms of marijuana, rendering a base level offense of 38. Purporting to give Petitioner the benefit of the doubt as to the legitimacy of some of the prescriptions, the court reduced this amount by 25% to 26,463.409 kilograms, which called for a base offense level of 36. In doing so, the court pointed out that even if it had reduced the amount of the MAPS data by 70%, the amount would have been 10,578.765 kilograms, which still falls within the base

offense level of 36. The MAPS data, which was the subject of an unresolved motion *in limine*, was not presented to the jury. Moreover, no evidence supporting the data was presented to either the district judge or the jury.

The court then increased the total offense level by 8 levels to 44, adding 4 levels for Petitioner's aggravating role, 2 levels for obstruction of justice, and 2 levels for abuse of a position of trust or use of a special skill. Under the Sentencing Guidelines, a total offense level of 44 and a Criminal History Category of I called for a life sentence. (In contrast, a total offense level of 24 and a Criminal History Category of I recommended a sentence of 4 to 5 years, a total offense level of 28 suggested a sentence of 7 to 8 years, and a total offense level of 32 called for a sentence of 10 to 12 years.) In his sentencing memorandum (A-44), Petitioner disputed the enhancement for obstruction of justice because it was based on nothing more than a swearing contest between Petitioner and an undercover officer as to what kind of physical examination he conducted in one office visit. Petitioner testified that he conducted a "focus physical" of the undercover officer and that he examined her strength by pulling on her hand. On direct examination, the officer acknowledged that Petitioner had held her hand, but on rebuttal she denied that he had pulled her fingers or wrapped his hand around hers. Petitioner argued that the conflict represented, at best, disputed testimony, not sentencing enhancement material. Petitioner also contested the court's conclusion that he was the organizer or leader of a criminal activity involving five or more people, since he

was a sole practitioner who was unaware of the independent criminal activities of his employees, and, in fact, the jury acquitted him of the conspiracy charge. Petitioner also challenged these adjustments on appeal, although the Sixth Circuit erroneously stated that he had not. In addition, defense counsel failed to oppose a two-level enhancement under U.S.S.G. § 3B1.3 for use of a special skill, even though such an enhancement is not appropriate when an adjustment is applied pursuant to U.S.S.G. § 3B1.1 for an aggravating role.

The court denied Petitioner's request for a downward departure based on his age, health, lack of prior criminal history, the fact that he would suffer as a result of the revocation of his medical license, he was a potential asset to society as a contributing member, and there was no risk of him being a repeat offender. Because the life sentence applicable under the Sentencing Guidelines exceeded the maximum twenty (20) year sentence available under 21 U.S.C. § 841(b)(1)(C), the court applied U.S.S.G. § 5G1.2(d) to make the sentences consecutive. Over Petitioner's objection, the district court sentenced him to twelve (12) consecutive 20-year terms (240 years) for writing twelve prescriptions for Oxycontin in violation of 21 U.S.C. § 821(b)(1)(C), fourteen (14) consecutive 5-year terms (70 years) for writing fourteen prescriptions for Vicodin in violation of 21 U.S.C. § 821(b)(1)(D), and eighteen (18) consecutive one-year terms for the misdemeanor offenses of writing eighteen prescriptions for cough syrup with codeine in violation of 21 U.S.C. § 821(b)(3), for a total of 328 years.

Petitioner appealed his sentence and his conviction to the Sixth Circuit Court of Appeals. Petitioner argued that the sentence was invalid because it was necessarily premised on facts determined by the court in violation of the *Apprendi-Blakely-Booker* line of cases, the data upon which the district court based its findings was wholly speculative, and the sentence was unreasonable under 18 U.S.C. § 3553(a) because it was greater than necessary to meet the purposes of sentencing. The Court of Appeals affirmed the sentence and conviction, stating that the *Apprendi* line of cases applies only if the court imposes a Guidelines sentence that exceeds the statutory or mandatory guidelines maximum, but because the district court acknowledged that the Sentencing Guidelines were not mandatory, *Apprendi* did not apply. Moreover, the Court of Appeals stated that the district court did not err in making additional findings based on the MAPS data because a district court may find additional facts not found by the jury in determining an advisory Guideline sentence. The appellate court concluded that the district court had adequately addressed the sentencing factors under 18 U.S.C. § 3553(a) and had acted within its authority in using consecutive sentences to effect the life sentence that the Guidelines authorized based on the district court's findings. The Court of Appeals made no observation about the reasonableness of the 328 year sentence.

Petitioner petitioned the Sixth Circuit Court of Appeals for a rehearing en banc, arguing that the sentence violated the Sixth Amendment, as applied, because it is unreasonable and, thus, would not have

been upheld, even as an upward variance or departure, but for the existence of facts found by the court but not by the jury. The Court of Appeals denied the petition for rehearing en banc.

ARGUMENT

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL, AS APPLIED, BY THE IMPOSITION OF A 328-YEAR SENTENCE, RATHER THAN A LESSER SENTENCE CALLED FOR BY HIS CONVICTED CONDUCT, BECAUSE THE SENTENCE WOULD NOT HAVE BEEN UPHELD AS REASONABLE BUT FOR FACTS FOUND BY THE DISTRICT COURT AND NOT BY THE JURY.

This case presents an important question of constitutional law that was left open by this Court in *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456 (2007), and *Gall v. United States*, 128 S. Ct. 586 (2007). There the Court prescribed substantive reasonableness review for sentences covered by the United States Sentencing Guidelines. Neither *Rita* nor *Gall*, however, addressed the issue squarely presented by the facts of this case, that is, whether a sentence that is found reasonable under substantive reasonableness review violates the Sixth Amendment, as applied, if it would not have been upheld as reasonable but for the existence of a fact found by the sentencing judge and not the jury. *See Rita*, 127 S. Ct. at 2474 (Scalia, J.,

concurring in part and concurring in the judgment); *Gall*, 128 S. Ct. at 602 (Scalia, J., concurring). Stated as the obverse, is a sentence that is patently unreasonable when only jury-found facts are considered reasonable under the Sixth Amendment, as applied? Petitioner contends that this Court's jurisprudence dictates an answer of "no."

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court established that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 303 (emphasis in original). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, . . . the judge exceeds his proper authority." *Id.* at 303-04 (emphasis in original) (quotation omitted) (citation omitted). Finally, in *United States v. Booker* , 543 U.S. 220 (2005), this Court applied the *Apprendi-Blakely* analysis to the United States Sentencing Guidelines, holding that the provisions of the Sentencing Reform Act making the Guidelines mandatory violated the Sixth Amendment right to a jury trial, as articulated in *Apprendi*.

Although this Court has never wavered from the central premise of *Apprendi* that any facts supporting a sentence in excess of the statutory maximum must be found by the jury beyond a reasonable doubt, since this Court's ruling in *Booker*, confusion has reigned over the continued role the Sentencing Guidelines should play in imposition of a sentence, and the notion that the Guidelines are valid if they are treated as merely advisory seems to have taken precedence over the basic right of the accused to have a jury find guilt beyond a reasonable doubt. The courts of appeal are in agreement that after *Booker* the maximum sentence for *Apprendi* purposes is the maximum statutory sentence that could be imposed, not the maximum sentence under the Guidelines. However, too frequently the courts of appeal and the sentencing courts overlook *Blakely*'s instruction that "the 'statutory maximum' . . . is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303 (emphasis in original). In the instant matter, for example, the Sixth Circuit completely ignored Petitioner's appeal to *Apprendi* and ignored the definition of statutory maximum in *Blakely*, erroneously stating that "[t]he limitation to jury-found facts [discussed in *Apprendi-Blakely-Booker*] applies only if the court imposes a guideline sentence that exceeds the statutory or mandatory guidelines maximum." (A-37 to A-38.) Having thrown off the shackles of mandatory sentencing under the Guidelines, the courts seem to have forgotten that the judiciary, no less than the Sentencing Commission, is subject to the rule in *Apprendi* that it is the jury which

must decide the existence of facts that determine the statutory maximum sentence.

This Court attempted to allay the confusion surrounding appellate review of a sentence following *Booker* by establishing a method of substantive reasonableness review. Under that system of review, the appellate court

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.

Gall, 128 S. Ct. at 597. If the district court's sentence is procedurally sound, then the court of appeals should employ an abuse of discretion standard to determine whether the sentence is substantively reasonable,

> tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is

> outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.

Id. (citation omitted). However, as Justice Scalia warned in his concurring opinions in *Gall* and *Rita*, this Court's failure to instruct the courts that judge-found facts are never legally necessary to justify a sentence means that some sentences will be upheld as reasonable only because of the presence of aggravating facts found by the court, but not by the jury. *Rita*, 127 S. Ct. at 2475-76. In such a case, if the result is a sentence that would be substantively unreasonable, even as an upward variance, based on the jury-found facts alone, then there is a violation of the Sixth Amendment as applied.

This case presents head-on the concerns expressed by Justice Scalia in *Rita* and *Gall*. Because the Court of Appeals ignored this Court's ruling in *Apprendi* in favor of purported substantive reasonableness review under *Rita* and *Gall*, the appellate court perfunctorily upheld a 328-year life sentence without even remarking on the discrepancy between the sentence imposed and the 5- to 12-year Guidelines sentence that would have been imposed had the sentencing court considered only facts found by the jury in sentencing Petitioner.

The fact that the district court acknowledged that the Sentencing Guidelines are not mandatory and that it paid lip service to the § 3553(a) factors should have been the beginning and not the end of the Sixth Circuit's reasonableness review. The appellate court stopped short, evaluating the manner in which the district court applied the Guidelines, but failing to assess the constitutional reasonableness of the result of that application, that is, the 328 year sentence.

If the sentencing court had applied the Guidelines with *Apprendi* in mind, then based on the facts found by the jury beyond a reasonable doubt, it would have grouped the offenses as required by U.S.S.G. §§ 3D1.1 and 3D1.2 and found a base offense level of no more than 24 and a total offense level of, at most, 32, if the 8-level upward adjustment imposed by the district court over Petitioner's objections were appropriate. Under the Guidelines, a total offense level of 24 calls for a sentence of 4 to 5 years, a total offense level of 28 recommends a custodial sentence of 7 to 8 years, and an offense level of 32, the propriety of which Petitioner continues to dispute, suggests a sentence of 10 to 12 years, or not more than 1/27th of the 328-year life sentence imposed. Instead of following the Guidelines, which the district court stated were reasonable, the sentencing court purported to rely on U.S.S.G. § 2D1.1 cmt. 12, and looked at other alleged evidence of Petitioner's controlled substance prescriptions to obtain a total offense level of 44, with a recommended sentence of life. The district court's application of Comment 12 violated the Sixth Amendment as applied because it allowed the district to unlawfully exceed both the recommended Guidelines

sentence and the statutory maximum sentence of 20 years based solely on judge-found facts.

Because the statutory maximum for the most serious offense was only 20 years, in order to achieve the life sentence corresponding to a total offense level of 44, the district court purported to rely on U.S.S.G. § 5G1.2(d) and ordered that the sentences on each and every convicted count would be served consecutively. (Petitioner acknowledges this Court's recent statement in *Oregon v. Ice*, 129 S. Ct. 711 (2009), that imposition of a consecutive sentence in and of itself does not implicate the Sixth Amendment. However, under circumstances, such as those in the instant matter, in which a sentencing court exercises its discretion to impose a consecutive sentence in an effort to justify an enhanced sentence supported solely by judicial factfinding, the Sixth Amendment, as applied, is violated.) The Sixth Circuit approved this application of § 5G1.2(d) without any recognition of—let alone a discussion of—the constitutional implications of utilizing this Guideline to enhance a sentence above the 20-year statutory maximum sentence based solely on facts not found by the jury.

The district court's multi-step manipulation of the Sentencing Guidelines to obtain a 328-year sentence was unreasonable even if the particular Guidelines on which the court relied were not unreasonable. First, the court made its own findings, speculating from a summary of statistical data (that cast no light on the question whether prescriptions were written with a proper medical purpose) that

Petitioner was responsible for almost 300 times the amount of controlled substances found by the jury.

Next, the court grouped the offenses under U.S.S.G. §§ 3D1.1 and 3D1.2 to obtain a single combined offense level. (Since, in this case, all of the convictions arose out of interactions with two undercover officers and an informant, and Petitioner believed that the distribution of the medications was in fact within the proper scope of his medical practice, the Government decided how many offenses would occur based upon how many times its informant and undercover officers went to Petitioner's office over a period of time. The Government, thus, played a major role in determining the number of offenses to be grouped.) Then the district court "stacked" the offenses, that is, imposed consecutive sentences for offenses which already had been grouped. The purpose behind the grouping rules is to "guard against the risk that technically distinct but related forms of criminal conduct, capable of being charged in separate counts, do not result in excessive punishment." *United States v. Vasquez*, 389 F.3d 65, 76 (2d Cir. 2004); *United States v. Kirkland*, 107 F.3d 872 (Table), 1997 WL 76211 (6th Cir. 1997). The Court of Appeals' allowance of "stacking" in this case eviscerated the purpose of the "grouping" rules.

The "total punishment" under the Guidelines, calculated properly, whether 4 to 5 years for an offense level of 24, 7 to 8 years for an offense level of 28, or 10 to 12 years for an offense level of 32, was far below the 20-year statutory maximum for Schedule II felonies. The combination of grouping and stacking resulted in

a sentence that is hugely disproportionate to the conduct, the severity of which is already reflected in the calculations under the grouping rules.

A sentence of 328 years is not substantively reasonable in a case in which the Sentencing Guidelines recommended a range of 4 to 5 years, or 7 to 8 years or even 10 to 12 years, and the maximum statutory sentence was 20 years. Certainly the sentencing court in this matter pointed to no evidence found by the jury that would justify such an enhancement. Thus, *only* by finding that Petitioner wrote prescriptions for almost 300 times the amount of controlled substances that the jury had found him guilty of was the sentencing court able to inflict—to borrow the term so appropriately used by the district court—a life sentence upon Petitioner under the Sentencing Guidelines. In effect, the jury found Petitioner guilty of 44 counts, but the district court found him guilty of 13,200 counts, 13,156 of which he was never charged with.

The fact that the Sixth Circuit did not deem it necessary to even comment on the enormous gulf between the 5 to 12 years justified by the evidence presented to the jury and the 328 years imposed or to inquire whether a sentence that was more than 16 times the maximum 20-year sentence permitted by Congress for the most serious offense was reasonable demonstrates the need for this Court's further guidance on the role of *Apprendi* in reasonableness review of federal sentencing decisions. Moreover, it demonstrates the need for this Court's guidance on the "as applied" role of the Sixth Amendment in

establishing an outer limit for punishment enhancements permissible solely on the basis of judge found facts at sentencing. Had the appellate court given serious consideration to the reasonableness of the sentence, it would have attempted to explain the wide disparity between the sentence based on convicted conduct and the sentence actually imposed.

The futility of substantive reasonableness review in this case is further exemplified by the failure of the Sixth Circuit's decision to mention that at oral argument the Government's attorney admitted that she was unaware of any other similar case with a comparable sentence and that the norm is usually 5 to 10 years for controlled substance offenses by doctors, even under more flagrant circumstances. Petitioner concurs with the Government's representation that an average sentence for a similar offense is 5 to 10 years. Indeed, although the appellate panel was informed of the case of Dr. William Hurwitz of Virginia, who, following a nationally publicized trial for prescribing oxycontin to patients in dosages 40 or more times greater than did Petitioner, was sentenced to 57 months (E.D. Va. Case No. 1:03-CR-00467, July 13, 2007), and although 18 U.S.C. § 3553(a)(6) directs sentencing courts to avoid unwarranted sentencing disparities among defendants with similar records who are convicted of similar offenses, the appeals court made no attempt to reconcile the severity of the sentence imposed on Petitioner for less egregious conduct with the sentence imposed on other physicians.

The lack of any true reasonableness review of the outrageous sentence imposed in this matter is

highlighted by the nature of the evidence on which the district court relied in concluding that Petitioner should spend the rest of his life in a maximum security prison for writing prescriptions for pain killers without a medical purpose. The sentencing judge extrapolated from the State of Michigan's MAPS information that Petitioner had unlawfully written prescriptions for 300 times the amount of controlled substances (in marijuana equivalency) for which he was charged and convicted and should be sentenced accordingly. However, the MAPS data did not establish the critical fact that Petitioner wrote any, let alone all, of the prescriptions attributable to him or that any were written without a legitimate medical purpose.

The only evidentiary value of MAPS data is to show that the State of Michigan records the number of prescriptions filled by pharmacies that are purported to have been written by a given medical care provider. That is all and nothing more. It does not show how many prescriptions have in fact been written by a given medical provider, and it offers no insight into how many have been written for a proper medical purpose or for an improper purpose. Casting even greater doubt upon the usefulness of the MAPS information in this matter, it should be noted that the sentencing court relied upon the number of prescriptions attributable to Petitioner during an 18-month period between January of 2003 (when the MAPS program began) and June of 2004, even though the charges against Petitioner only covered a 3-month period from April of 2004 to June of 2004.

MAPS records all prescriptions filled by pharmacies in the State of Michigan, whether the prescriptions are lawful or unlawful, forged, altered, written by others, written for a proper medical purpose or not. Here the sentencing court erroneously relied on MAPS information and applied U.S.S.G. § 2D1.1 cmt. 12 to obtain an offense level corresponding to a drug amount that was almost 300 times the amount of marijuana equivalency that Petitioner had been charged on convicted of. Even if a sentencing court could consider other quantities of drugs in appropriate circumstances, the district court's reliance on U.S.S.G. § 2D1.1 cmt. 12 was improper in the absence of evidence that the MAPS data involved only illegal or primarily illegal prescriptions. That section of the Sentencing Guidelines has no application to this case because it is expressly intended to apply to cases involving a drug seizure where, by definition, all of the drugs are illegal.

The absence of reliability of the MAPS information for the purpose utilized by the sentencing judge was acknowledged by the MAPS representative at the sentencing hearing. The representative conceded that he had no idea how many of the prescriptions imputed to Petitioner by the MAPS program were written for a proper medical purpose or an improper purpose. The connection between the number of prescriptions attributable to Petitioner and the number of prescriptions in fact written by him and not written for a proper medical in this cases is even more tenuous. The jury heard evidence that others were forging Petitioner's name, and that others were altering prescriptions written by him. In fact,

Petitioners codefendants, the Garners, pleaded guilty to such conduct. Instead of adhering to the jury's acquittal of Petitioner on the conspiracy charge, the sentencing court in a broad sweep enhanced Petitioner's sentence beyond both the recommended Guidelines sentence and the statutory maximum sentence based solely upon prescriptions merely attributable to him by the MAPS program.

Quite simply the MAPS information was of no evidentiary value in connection with a mathematical analysis of the number of unlawful prescriptions written by Petitioner, and it cannot stand as a basis for an overreaching sentencing court to increase his offense by three-hundred-fold in marijuana equivalency.

Because of the obvious lack of reliability of the MAPS evidence, and the total lack of its utility as quantitative proof, the court ultimately decided to reduce the amount attributed to Petitioner by 25%, on the theory that at least some of the prescriptions could have been legitimate, and pointed out that even if the data were reduced by 70%, the same base offense level would apply. This begs the question, why stop at 70%? The district court could have—and should have—reduced the MAPS data by 100% and simply adhered to *Apprendi*. The sentencing court's approach was speculative and did not satisfy even a preponderance of the evidence standard, if such a standard could be appropriately applied.

It is difficult to believe that had Petitioner appeared in court, entered a plea of guilty to the

indictment, and then been sentenced to 328 years in prison that any reviewing court could view such a sentence as reasonable. The punishment inflicted on Petitioner is an as-applied violation of his Sixth Amendment rights.

The failure of the Sixth Circuit to truly review Petitioner's sentence for constitutional reasonableness, while purporting to adhere to this Court's outline for substantive reasonableness review requires that this Court further instruct the courts on the role of *Apprendi* in federal sentencing. This Court applied *Apprendi* as recently as in *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856 (2007), when it reversed the California Court of Appeal's affirmance of a 16-year state sentence because the jury's verdict alone limited the permissible sentence to 12 years, and the 4-year elevation based on judicial fact-finding denied the petitioner his right to a jury trial. In this case, in which a federal appeals court affirmed as substantively reasonable a sentence that is not simply 27 years more, but 27 times that called for by the facts established by the jury beyond a reasonable doubt, it is clear that the federal courts need further instruction. Because of the ongoing confusion in the federal courts since this Court decided *Booker*, it is of critical importance to federal sentencing jurisprudence that this Court clarify that the Sixth Amendment imposes an "as applied" limit to a district court's ability to find facts after a jury has been discharged that exponentially elevates the punishment to which the defendant is subject.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests this Honorable Court to grant his petition and issue a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

Martin Errol Rice
Attorney for Petitioner

No. _____

In The
Supreme Court of the United States

MUKUNDA DEV MUKHERJEE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CRIMINAL CASE NO. 04-50044

v.

MUKUNDA DEV MUKHERJEE, M.D.,

HONORABLE PAUL V. GADOLA
U.S. DISTRICT COURT

Defendant.

_____/

ORDER

I. Background

On February 3, 2006, Defendant was convicted by a jury to 44 counts of illegal distribution of controlled substances. Defendant was found not guilty to 9 counts of illegal distribution of controlled substances and not guilty to 1 count of conspiracy to illegally distribute controlled substances.

In preparation for sentencing, the Probation Department prepared a Presentence Investigation Report ("PSIR"). The PSIR recommended under the United States Sentencing Guidelines ("USSG") that a base offense level of 36 be used, corresponding to the quantity of drugs involved in the offenses. The PSIR also recommended an increase of 4 levels for

Defendant's leadership role in the offense and an increase of 2 levels because of Defendant's use of a special skill and abuse of a position of trust in order to commit the offense. This yields a total offense level of 42. The government requested an increase of an additional 2 levels due to Defendant's obstruction of justice. Because Probation was not present at trial, Probation was unable to make a recommendation concerning the requested enhancement for obstruction of justice.

Both parties filed objections to the PSIR. A sentencing hearing was held on July 5, 2006 and continued on July 7, 2006. At the sentencing hearing, testimony from witnesses was taken and both parties presented arguments supporting their respective positions.

Initially, prior to the hearing, the government objected only to the PSIR calculation of the base offense level contingent on drug quantity, and argued that the base offense level should be 38, not 36 as recommended in the PSIR. At the July 7, 2006 hearing, however, the government withdrew its objection and stated that it was satisfied with the base offense level of 36 as recommended in the PSIR. Therefore, the government currently has no objections to the PSIR, and only argues that the PSIR recommendation should be enhanced by two levels because of Defendant's obstruction of justice.

Defendant makes several objections to the PSIR recommendation concerning four different issues:

1. What quantity of drugs should be used to establish a base sentencing level.

2. Whether there should be an enhancement due to Defendant's leadership role.

3. Whether there should be an enhancement due to Defendant's obstruction of justice.

4. Whether there should be a discretionary downward departure in Defendant's sentence.

The Court will now examine each of these four issues in turn.

II. Analysis

1. What quantity of drugs should be used to establish a base sentencing level

For determining the quantity of drugs involved in the offense, Probation and the government used Michigan Automated Prescription System ("MAPS") data. MAPS is a system established by the state of Michigan that records all prescriptions for Schedule II, III, IV, and V controlled substances. In this case, MAPS recorded all prescriptions for scheduled drugs that were written by Defendant between January 1, 2003 and June 30, 2004. Based on the Sentencing Guidelines, the quantity of drugs prescribed between January 1, 2003 and June 30, 2004 were converted into an equivalent marijuana amount. Using all the drugs prescribed by Defendant and recorded in MAPS gives a marijuana equivalency of 35,262.549 kg, a base

offense level of 38. (Base offense level 38 corresponds to 30,000 kg or more of marijuana.) In the PSIR, Probation found that based on the testimonies of the undercover police officers and of other witnesses, and based on the refusal of local pharmacies to fill Defendant's prescriptions, it was reasonable to believe that there was no longer any legitimate medical practice occurring at Defendant's office. However, because Probation was not confident in saying that every single one of Defendant's prescriptions was illegitimate and to err on the side of caution, Probation reduced the amount of MAPS drugs used for the calculation by 25%, yielding a total marijuana equivalent amount of 26,463.409 kg, a base offense level of 36. (Base offense level 36 corresponds to at least 10,000 kg but less than 30,000 kg of marijuana.) Initially, the government objected to this level 36 recommendation, arguing that the total amount of MAPS prescriptions without a deduction should be used to calculate a base offense level of 38. However, at the July 7, 2006 hearing, the government withdrew this objection and concurred with level 36 as recommended by Probation.

Defendant objected to PSIR recommendation, arguing that only the amount of controlled substances found in the counts on which Defendant was convicted should be used for calculating the base offense level. Using only the total amount of controlled substances from the counts on which Defendant was convicted, the marijuana equivalency is 98.29 kg, corresponding to a base offense level of 24. In support of his argument, Defendant notes that he was acquitted on the conspiracy charge and on several charges of illegal

distribution. Defendant argues that the jury's acquittals on these charges demonstrate that Defendant's medical practice, on the whole, was legitimate.

In sentencing, this Court is not limited to consider only the amount of drugs found in the counts of conviction. The Court can consider additional quantities of drugs in order to calculate the sentencing offense level. Comment 12 in the Sentencing Guidelines, at Section 2D1.1 states:

> Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. *See* § 1B.1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substances, financial or other records, similar transactions in controlled substances by the defendant, and the size of capability of any laboratory involved.

USSG § 2D1.1, Comment 12.

The standard for determining the amount of drugs used in the offense is a preponderance of the evidence standard, not a beyond a reasonable doubt

standard. Therefore, if the Court determines that the amount of drugs contained solely in the convictions does not reflect the scale of the offense, and the Court finds by a preponderance of the evidence that additional prescriptions were not legitimate, then the Court can approximate the quantity of controlled substances and use the larger amount of drugs to determine a base offense level. *See United States v. Mickens*, 453 F.3d 668 (6th Cir. 2006) ("Mickens next argues that *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), bars district courts from applying a preponderance standard in finding facts at sentencing. But he has much to overcome in making this argument: By now, it is well established that the preponderance standard does not violate Booker, so long as the trial court appreciates that the guidelines are advisory, not binding.").

The government argues that the testimonies of witnesses at trial and other evidence shows that Defendant was no longer legitimately practicing medicine, and thus, the great majority (if not all) of Defendant's prescriptions were illegitimate. The evidence demonstrates a number of practices uncommon to the legitimate practice of medicine occurring in Defendant's office: patients paying only cash for medical services; long lines and jockeying for a better position to see Defendant; multiple patients being brought into the doctor's office for examination at one time; the unusual state of Defendant's office, with files on the examination table and Defendant with his feet up on the desk; the drug use in the office's bathroom; Defendant's practice of regularly keeping the office open to 1:00 or 2:00 a.m.; drug addicts coming

from out of state to get prescriptions; and local pharmacies refusing to honor Defendant's prescriptions.

The Court recognizes that it is impossible to determine the exact number of legitimate and illegitimate prescriptions written by Defendant. However, the Court is not required to find the exact amount of drugs, but can approximate the amount of drugs involved in the offense. *See* USSG § 2D1.1, Comment 12 ("Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance."). Based on all the testimony and other evidence offered at trial, there is a preponderance of the evidence that the drug amount represented in Defendant's convictions "does not reflect the scale of the offense" in which Defendant was involved. The Court finds that Defendant wrote many more prescriptions without a legitimate medical purpose than the 44 prescriptions in his counts of conviction and that Defendant's medical office was effectively a prescription mill with addicts coming from out-of-state to get prescriptions, eventually making local pharmacies suspicious of Defendant's practice.

As noted above, the total amount of controlled substances prescribed by Defendant in MAPS has a marijuana equivalency to 35,262.549 kg, corresponding to a base offense level of 38. Probation reduced that amount by 25%, to give Defendant the benefit of the doubt for prescriptions that might have been legitimately prescribed. A 25% reduction of 35,262.549 kg is 26,463.409 kg, corresponding to a base offense

level of 36. Even if the total amount of MAPS drugs was reduced by 70% to 10,578.765 kg, this would still correspond to a base offense level of 36. Thus, even if only 30% of Defendant's prescriptions were illegitimate, a base offense level of 36 is still recommended by the Sentencing Guidelines.

The Court finds that there is a preponderance of the evidence supporting the position that Defendant was generally engaging in an illegitimate medical practice, with at least the majority of his prescriptions being written without a legitimate medical purpose. To only consider the drugs in the conviction, as Defendant requests, "does not reflect the scale of the offense." *See* USSG § 2D1.1, Comment 12. Accordingly, Defendant's objection to the PSIR is overruled, and the Court will use the recommended base offense level of 36 for sentencing.

2. Whether there should be an enhancement due to Defendant's leadership role

In the PSIR, Probation recommends that Defendant's offense level be enhanced by 4 levels due to Defendant's leadership role in the criminal activity. Defendant objected to this enhancement. Section 3B1.1 of the Sentencing Guidelines states:

> Aggravating Role
>
> Based on the defendant's role in the offense, increase the offense level as follows:

a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

USSG § 381.1.

In support of his objection, Defendant argues he could not have been an organizer or leader of a criminal activity involving five or more people, because he was acting alone and not in conspiracy with at least four other people. Defendant notes that his acquittal on the conspiracy count gives additional strength to his argument that Defendant's actions constituted a one-man enterprise. The government argues that there was sufficient evidence presented at trial that demonstrated that the criminal activity involved more than five people. In particular, the government argues that there were multiple receptionists who accepted money from patients, managed the patients waiting in

line, brought the patients and charts in to Defendant's office, and took patients' blood pressures. These receptionists created the appearance of a normal doctor's office, and were paid for their services by Defendant in cash and in prescriptions. The government notes that one of the witnesses at trial, Patricia Garner, identified several of the receptionists by name, and testified that 12 to 15 people worked as receptionists at various times, a number in excess to the five individuals required under USSG § 3B1.1(a).

Accordingly, the Court finds that there is a preponderance of the evidence demonstrating that Defendant was a leader of a criminal activity involving five or more participants. Though there might not have been an express agreement between the parties to engage in criminal activity, an express agreement is not needed. Instead, the evidence demonstrates that Defendant hired four or more people to act as receptionists and nurses in his office. These people enabled the office to operate by managing the patients in line, by accepting their money, by bringing the patients to Defendant, by bringing the patients' medical charts, and by taking patients' blood pressures. Thus, at least five people were involved in the criminal activity of which Defendant was the leader. Accordingly, Defendant's objection to the PSIR recommendation on the issue of Defendant's leadership role is overruled, and the Court will apply the recommended 2-level enhancement for sentencing.

3. Whether there should be an enhancement due to Defendant's obstruction of justice

The government requests that Defendant's sentencing level be increased by 2 levels due to Defendant's obstruction of justice. Defendant opposes the government's motion. Because Probation was not present during trial, it is unable to make a recommendation on this issue. Section 3C1.1 of the Sentencing Guidelines states:

> Obstructing or Impeding the Administration of Justice
>
> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

USSG § 3C1.1.

The government notes that at trial, undercover police officer Detective Guerrero testified unequivocally that Defendant did not conduct a physical examination when Defendant was alone with Guerrero in his office, during a visit where Guerrero received prescriptions.

Detective Guerrero testified that she was "100% positive" that Defendant had not done the examination. On the witness stand, Defendant testified that he had done a physical examination of Guerrerro, through a series of tests by pushing and pulling on the detective's hands. Based on the Court's observation of the witnesses, their demeanor and their candor with the Court, the Court finds Detective Guerrero's testimony to be credible, and that Defendant did not perform a physical examination on Guerrero before issuing a prescription.

Consequently, the Court finds that a preponderance of the evidence indicates that Defendant willfully failed to tell the truth on the witness stand, thereby obstructing or impeding the administration of justice. This obstructive conduct directly relates to Defendant's offense of conviction. Accordingly, the government's request for a 2-level enhancement for obstruction of justice is granted, and Defendant's objection is overruled.

4. Whether there should be a discretionary downward departure

Finally, Defendant argues for a downward departure in sentencing. Defendant requests that his sentence be equal to time he has already served, equalling approximately 26 months. In support, Defendant argues that there should be a downward departure because of his age and health; because of his lack of prior criminal history; because he will suffer enough with the revocation of his medical license; because he is a potential asset to society as a

contributing member; and because there is a low risk of him being a repeat offender.

In response, the government notes the egregious nature of Defendant's offense: Defendant abused his position as doctor having taken an oath to heal patients, and instead supported and created drug addiction, which is extremely damaging to society. The government argues that Defendant's offense is more serious and detrimental to society than the majority of drug offenders who normally come before the Court, because Defendant's conduct affected a larger number of people suffering from drug addiction and affected them to a greater degree than the conduct of a street drug dealer. Having considered all the evidence presented to the Court, the Court finds that Defendant's offense was egregious and Defendant's situation does not merit a downward departure.

Accordingly, the Court denies Defendant's request to make a discretionary downward departure in sentencing.

III. Conclusion

Noting that the Sentencing Guidelines are only discretionary and not mandatory, this Court finds that the sentencing recommendation as set forth in the PSIR is a reasonable one under the circumstances. Consequently, the Court overrules Defendant's objections to the PSIR. In addition, the Court grants the government's request for a 2-level enhancement for obstruction of justice. Finally, the Court denies Defendant's request for a discretionary downward

departure. Therefore, applying a base offense level of 36, adding a 2-level enhancement for abuse of trust, a 4-level enhancement for an aggravating role, and a 2-level enhancement for obstruction of justice yields a total recommended sentencing level of 44.

SO ORDERED.

Dated: 10/23/2006 s/Paul V. Gadola
HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

Certificate of Service

I hereby certify that on 10/23/2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:
Mark Jones, David Griem, and I hereby certify that 1 have mailed by United States Postal Service the paper to the following non-ECF participants: n/a.

s/Ruth Brissaud
Ruth A. Brissaud,
Case Manager
(810) 341-7845

United States District Court
Eastern District of Michigan

United States of America
V.
MUKUNDA DEV MUKHERJEE, M.D.

JUDGMENT IN A CRIMINAL CASE

Case Number: 04CR50044-1
USM Number: 32278-039

David Griem and Brian G. Shannon
Defendant's Attorney

THE DEFENDANT:

Was found guilty on count(s): **Counts Three, Four, Seven, Nine, Eleven through Thirteen, Fifteen, Seventeen through Twenty-Five, Twenty-Seven through Fifty, Fifty-Two through Fifty-Four of First Superseding Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count

See page 2 for details.

The defendant is sentenced as provided in pages **2 through 9** of this judgment. This sentence is imposed pursuant to the Sentencing Reform Act of 1984

The defendant has been found not guilty on count(s): **One, Two, Five, Six, Eight, Ten, Fourteen, Sixteen, Twenty-Six, and Fifty-One of the First Superseding Indictment** after a plea of not guilty.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 23, 2006
Date of Imposition of Judgment
s/ Paul V Gadola
Paul V Gadola
United States Senior Judge

s/ 10/25/06
Date Signed

DEFENDANT: MUKUNDA DEV MUKHERJEE, M.D.
CASE NUMBER: 04CA50044-1

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. 841(a)(1)	Illegal Distribution of Schedule II Controlled Substances	06/04	3, 9, 11, 19, 24, 25, 30
21 U.S.C. 841(a)(1)	Illegal Distribution of Schedule II Controlled Substances	06/04	35, 38, 41, 45 and 50
21 U.S.C. 841(a)(1)	Illegal Distribution of Schedule III Controlled Substances	06/04	13, 17, 20, 22, 28, 31 33, 37, 39, 42, 44
21 U.S.C. 841(a)(1)	Illegal Distribution of Schedule III Controlled Substances	06/04	33, 37, 39, 42, 44
21 U.S.C. 841(a)(1)	Illegal Distribution of Schedule III Controlled Substances	06/04	46, 48 and 53
21 U.S.C. 841(a)(1)	Illegal Distribution of Schedule V Controlled Substances	06/04	4, 7, 12, 15, 18, 21, 23
21 U.S.C. 841(a)(1)	Illegal Distribution of Schedule V Controlled Substances	06/04	27, 29, 32, 34, 36
21 U.S.C. 841(a)(1)	Illegal Distribution of Schedule V Controlled Substances	06/04	40, 43, 47, 49, 52 and 54

DEFENDANT: MUKUNDA DEV MUKHERJEE, M.D.
CASE NUMBER: 04CR50044-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

See next page for imprisonment terms.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____, a _____, with a certified copy of this judgment.

_____
United States Marshal

_____
Deputy United States Marshal

DEFENDANT: MUKUNDA DEV MUKHERJEE, M.D.
CASE NUMBER: 04CR50044-1

ADDITIONAL IMPRISONMENT TERMS

20 years on each of Counts 3, 9, 11, 19, 24, 25, 30, 35, 38, 41, 45 and 50; 5 years on each of Counts 13, 17, 20,

22, 28, 31, 33, 37, 39, 42, 44, 46, 48 and 53; and 1 year on each of Counts 4, 7, 12, 15, 18, 21, 23, 27, 29, 32, 34, 36, 40, 43, 47, 49, 52 and 54, all counts to be served consecutive to all others; all intended to accomplish a life sentence.

The Court waives the imposition of a fine, the costs of incarceration and the costs of supervision, due to the defendant's lack of resources.

While in custody, the defendant shall participate in the Inmate Financial Responsibility Program (IFRP). The Court is aware of the requirements of the IFRP and approves the payment schedules of this program and hereby orders the defendant's compliance.

DEFENDANT: MUKUNDA DEV MUKHERJEE, M.D.
CASE NUMBER: 04CR50044-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three years on each of Counts 3, 9, 11, 13, 17, 19, 20, 22, 24, 25, 28, 30, 31, 35, 37, 38, 39, 41, 42, 44, 45, 46, 48, 50 and 53, all to be concurrent.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custory of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

If the defendant is convicted of a felony offense, DNA collection is required by Public Law 108-405.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. Revocation of supervised release is mandatory for possession of a controlled substance.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report of the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

14) the defendant shall not possess a firearm, ammunition, destructive device, or any other

dangerous weapon. Revocation of supervised release is mandatory for possession of a firearm.

DEFENDANT: MUKUNDA DEV MUKHERJEE, M.D.
CASE NUMBER: 04CR50044-1

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall make monthly installment payments on any remaining balance of the special assessment at a rate and schedule recommended by the Probation Department and approved by the Court.

The defendant shall not incur any new credit charges or on additional lines of credit without the approval of the probation officer.

The defendant shall provide the probation officer access to any requested financial information.

The defendant shall not practice medicine in any form.

DEFENDANT: MUKUNDA DEV MUKHERJEE, M.D.
CASE NUMBER: 04CR50044-1

CRIMINAL MONETARY PENALTIES

	Assessment	**Fine**	**Restitution**
TOTALS:	$ 3050.00	$ 0.00	$ 0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority

order or percentage payment column below. However, pursuant to 18 U.S.C. 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS:	$ 0.00	$ 0.00	

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MUKUNDA DEV MUKHERJEE,M.D.
CASE NUMBER: 04CR50044-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows: Payment to begin immediately (may be combined with F below)

Special instructions regarding the payment of criminal monetary penalties: **The defendant shall make monthly installment payments on any remaining balance of the special assessment at a rate and schedule recommended by the**

Probation Department and approved by the Court.

Unless the court has expressly ordered otherwise in the special instructions above, while in custody, the defendant shall participate in the Inmate Financial Responsibility Program. The Court is aware of the requirements of the program and approves of the payment schedule of this program and hereby orders the defendant's compliance. All criminal monetary penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall forfeit the defendant's interest in the following property to the United States:

Sec detail list attached.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: MUKUNDA DEV MUKHERJEE, M.D.
CASE NUMBER: 04CR50044-1

ADDITIONAL FORFEITED PROPERTY

In accordance with the Stipulated Preliminary Order of Forfeiture entered January 18, 2006, Defendant Mukherjee is hereby ordered to forfeit the following assets to the United States:

(a) One Hundred Five Thousand One Hundred Thirty Dollars and Seventy-Two Cents ($105,130.72) seized from Saginaw Medical Federal Credit Union Account #0010420009;

(b) Eleven Thousand Six Hundred Fifty-Six Dollars and Seventy-Nine Cents ($11,656.79) seized from Bank One Account #60C-963679;

(c) Ten Thousand Two Hundred Sixty Dollars and Eighty-Nine Cents ($10,260.89) seized from Saginaw Medical Federal Credit Union Account #0026532-000;

(d) Thirty-Four Thousand Three Hundred Seventy-Seven Dollars and Twelve Cents ($34,377.12) seized from Bank One Account #000000637742875; and

(e) Seven Thousand Nine Hundred Fourteen Dollars and Sixty-Three Cents ($7,914.63) seized from Bank One Account #60M-089144.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

FILED
AUG 14 2008
LEONARD GREEN, Clerk

No. 06-2412
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
Plaintiff/Appellee,	) ON APPEAL FROM
	) THE UNITED
	) STATES DISTRICT
v.	) COURT FOR THE
	) EASTERN
MUKUNDA DEV MUKHERJEE, M.D.,	) DISTRICT OF
	) MICHIGAN,
	) SOUTHERN
Defendant/Appellant.	) DIVISION

Before: BATCHELDER, SUTTON, and FRIEDMAN,* Circuit Judges.

FRIEDMAN, Circuit Judge. The appellant, Mukunda Dev Mukherjee, a physician, challenges his

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*Daniel M. Friedman, Senior Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

jury conviction in the United States District Court for the Eastern District of Michigan of forty-four counts of illegal distribution of controlled substances and his sentence. The case involved Dr. Mukherjee's writing of a large number of prescriptions for controlled substances, including oxycontin and vicodin, at a charge of $45 per prescription. We affirm both his conviction and his sentence.

A. There was evidence, the sufficiency of which to support the verdict is not challenged, from which the jury could have found:

Dr. Mukherjee had his office in Flint, Michigan, where his office hours were from 10 a.m. until sometimes as late as 3 a.m. The examination table in his office was covered with files and boxes. The only medical equipment in the office were tongue depressors and an x-ray machine. In seeing patients, Dr. Mukherjee sat behind his desk, frequently with his feet on it and wearing a baseball hat.

Patients, who were unknown to each other, entered the office in groups of two to four. In return for $45.00 in cash paid directly to Dr. Mukherjee, each patient received a prescription for a controlled substance. If the patient wanted an additional prescription (which was post-dated), the total fee was $90.00. Dr. Mukherjee required his patients to have an MRI report in order to obtain a prescription for oxycontin, a highly addictive drug. He frequently issued prescriptions without making any physical examination of the patient.

At some point; the pharmacies in Flint refused to fill Dr. Mukherjee's prescriptions. Dr. Mukherjee's staff identified for patients other pharmacies elsewhere in Michigan where they could have their prescriptions filled. Patients traveled to those locations for that purpose.

B. The superseding indictment charged Dr. Mukherjee and two others with one count of conspiracy to distribute controlled substances and fifty-four counts of illegally distributing prescriptions for such substances, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), (b)(1)(D) and (b)(3). The jury convicted him of forty-four counts of illegal distribution and acquitted him of ten counts of illegal distribution and of conspiracy. Each distribution count involved a prescription for a particular controlled substance issued to a particular patient.

At trial, the prosecutor introduced the testimony of three undercover police officers who, using false names, made a total of seven visits to the doctor's office over a three-month period. Collectively, they obtained fifty-three prescriptions for various controlled substances, paying Dr. Mukherjee $45.00 in cash for each one. Dr. Mukherjee did not physically examine the officers before issuing the prescriptions to them.

Dr. Mukherjee testified in his own defense. He stated that he had issued the prescriptions for the controlled substances to alleviate the patients' severe pain, that such prescribing was proper and appropriate medical practice, and that he had done nothing wrong. In response to the question "[y]ou're telling these jurors

that herding three or four people into your office that don't know each other is a legitimate medical practice, is that your testimony, sir?", he stated: "[a]bsolutely and totally." **[J.A. 1675]**

At the end of his cross-examination, there was the following colloquy between the prosecutor and Dr. Mukherjee:

> Q: As far as you're concerned, Dr. Mukherjee, you did nothing wrong, isn't that true?
>
> A: Yes, that is correct . . .
>
> Q: Sir, would you listen to me. Given another chance you'd write every one of those controlled substance prescriptions again that you wrote in 2001 and '04, you're ready to go, right? You'd do it again? Sir?
>
> A: Yes. **[J.A. 1722-23]**

In determining Dr. Mukherjee's sentence, the district court imposed the statutory maximum under each count, to be served consecutively. The district court stated that it was imposing a life sentence, and the parties have treated the sentence as such. The sentences total 328 years. Dr. Mukherjee was sixty-four years old at the time of sentencing.

II

Dr. Mukherjee challenges his conviction on four grounds. None is persuasive.

A. He contends that he was denied a fair trial because the district court excluded the testimony of his expert witness, Dr. Baumann. The government had introduced the testimony of Dr. Thornburg, an osteopathic physician and pharmacologist, who opined that Dr. Mukherjee's issuance of the prescriptions for controlled substances was not a proper medical practice. Dr. Mukherjee then proposed to call as an expert witness Dr. Baumann, a pharmacist who had a doctorate of pharmacy. According to Dr. Mukherjee, Dr. Baumann was an expert in pain management, who apparently would testify that Dr. Mukherjee's actions were medically appropriate. His defense counsel told the court that Dr. Baumann would "be able to testify based upon his experience, based upon his credentials that what the doctor was doing and what he did was part of a legitimate medical practice." **[J.A. 1416]**

The district court refused to permit Dr. Baumann to testify. The court stated: "while he may be a very esteemed person in the field of pharmacy of the practice of pharmacy and what he does at Munsen Medical Center, . . . I don't think he's got the qualifications to evaluate the actions of this physician in his practice." **[J.A. 1424]** When Dr. Mukherjee suggested that Dr. Baumann would be qualified to testify as an expert in pain management, the court responded: "[h]e's not a medical doctor, he's not a - - he's not a D.O., he's not an M.D. And I don't think that

under the circumstances his testimony is admissible on this matter." **[J.A. 1427]**

We review a district court's ruling on whether to permit an expert witness to testify before a jury for abuse of discretion. *United States v. Jones* , 107 F.3d 1147, 1150-51 (6th Cir. 1997). Dr. Baumann was a pharmacist who could not issue prescriptions. **[J.A. 1422]** He was not a physician. His professional skills and qualifications were in analyzing and filling prescriptions. He may have been an expert in pain management, but that expertise did not extend to determining what treatment (including appropriate medication) would be appropriate for a particular condition or patient. The district court did not abuse its discretion in refusing to permit Dr. Baumann to testify that Dr. Mukherjee's issuance of a large number of prescriptions for controlled substances constituted appropriate medical practice.

B. Dr. Mukherjee accuses the government of prosecutorial misconduct because the prosecutor kept in the courtroom boxes containing all the prescriptions that Dr. Mukherjee had issued during the three-year period charged in the conspiracy count. According to Dr. Mukherjee, "by putting boxes of prescriptions in plain sight of the jury - and deliberately referencing them while cross-examining Defendant as though they were all 80 mg OxyContin prescriptions - the prosecutor was suggesting to the jurors that they should assume every prescription in the boxes was written without a legitimate medical purpose." **[Bl. Br. 54-55, footnote omitted]**.

Nothing in the record supports such hyperbole. The prescriptions had been listed on the government's exhibit list. During cross-examination of Dr. Mukherjee the prosecutor stated that he might offer the prescriptions in his rebuttal **[J.A. 1628-1629]**, although he did not do so. The presence of the boxes in the courtroom did not deny Dr. Mukherjee a fair trial.

C. Dr. Mukherjee next contends that he was denied a fair trial when the government excused a female, African-American juror after she had been seen talking to a man who had attended the trial and sat behind Dr. Mukherjee and apparently was a friend of his. The conversation took place after the jury had been excused at the end of the day.

The following morning the court questioned the juror about the incident and was told that she had not discussed the case and that the man had returned to Chicago. When the court wondered whether the juror should be excused, defense counsel stated: "[w]e'll leave that up to Your Honor." **[J.A. 947]** After further questioning of the juror, the court stated that: "it might be best under the circumstances if I excuse you from the jury because there might be - - might be a possible indication here that some impropriety, and - - and especially when I learned the gentleman that engaged you in that conversation is a friend of the defendant here." **[J.A. 951]**. The court excused the juror and defense counsel objected. **[J.A. 952-53]**

Considering all the circumstances, the district court acted within its discretion in excusing the juror. Indeed, it appeared that initially defense counsel had

not objected but left it to the court to do what it deemed appropriate.

D. Finally, Dr. Mukherjee contends that at his trial he was denied effective assistance of counsel because of three alleged errors his attorney committed. "[W]e typically do not consider ineffective assistance of counsel claims on direct appeal, because the record usually is not sufficiently developed to permit proper assessment of such claims." *United States v. Neuhausser*, 241 F.3d 460, 474 (6th 2001). We follow that practice here. Moreover, considering the nature of the alleged deficiencies by counsel and the strength of the government's case, it appears unlikely that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" or that counsel's alleged "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984).

III

A. The district court held three separate hearings, at which witnesses testified, before announcing the sentence. It recognized that "the guidelines in this case are no longer mandatory guidelines, they are suggested guidelines." **[J.A.1995, 2010]** The court "determin[ed], finally," to "follow the guidelines, finding them to be an appropriate penalty in this matter even though as I say the guidelines are not - - are not mandatory. And I find that the guideline range in this particular offense is certainly an appropriate one for infliction of a - - an appropriate

penalty." **[J.A. 1995]** The court explained at length how and why it imposed the particular sentence. **[J.A. 1993-2016]**

The court determined that the proper offense level under the guidelines was 36. The principal issue in dispute was the amount of drugs covered by the prescriptions Dr. Mukherjee had issued. The court concluded that

> [b]ased on all the testimony and other evidence offered at trial, there is a preponderance of the evidence that the drug amount represented in defendant's convictions does not reflect the scale of the offense in which defendant was involved.
>
> The Court finds that the defendant wrote many more prescriptions without a legitimate medical purpose than the 44 prescriptions in his counts of conviction. And that defendant's medical office was effectively a prescription mill with addicts coming from out of state even to get prescriptions, eventually making local pharmacies suspicious of defendant's practice. **[J.A. 2003]**

The court utilized data provided by "the Michigan Automated Prescription System," "a system established by the State of Michigan that records all prescriptions for Schedule II, III, IV, and V controlled substances." It explained:

> In this case MAPS recorded all prescriptions for scheduled drugs that were written by the defendant between January the 1st, 2003 and June the 30th, 2004. Based on the sentencing guidelines, the quantity of drugs prescribed between January 1st, 2003 and June 30th, 2004, were converted into an equivalent marijuana amount using all the drugs prescribed by defendant and recorded in MAPS gives a marijuana equivalency of 35,262.549 kilograms. **[J.A. 1998-99]**

The Probation Department had reduced the number of prescriptions written by twenty-five percent because not all of them were necessarily medically inappropriate. This calculation "yield[ed] a total marijuana equivalent amount of 26,463.49 kilograms of marijuana. And that results in a base offense level of 36." **[J.A. 1999]** The court pointed out that even if the total amount of drugs involved in the MAPS data were reduced by 70 percent, "all the way down to 10,578.765 kilograms of marijuana equivalent, this would still correspond to a base offense level of 36." **[J.A. 2004]** The court rejected Dr. Mukherjee's contention that only the amount of controlled substances involved in the counts on which he was convicted could be used in determining his offense level.

After calculating the offense level as 36, the district court made three upward adjustments that are here unchallenged—two levels for abuse of a position of trust, four levels for a leadership role, and two levels

for obstruction of justice by giving false testimony. **[J.A. 2004-07, 2007-09, 2111]** The court denied Dr. Mukherjee's request for a two level downward departure. **[J.A. 2009-2010]** These calculations produced a total offense level of 44, for which the guideline range was life imprisonment. **[J.A. 2011-12]** The court imposed a life sentence. **[J.A. 2012]** Because none of the counts of conviction provided for a life sentence, however, the court explained that the sentence consisted of the statutory maximum on each count of conviction, to be served consecutively. **[J.A. 2005-16]**

B. Dr. Mukherjee's principal challenge to his sentence is his claim that because the jury did not make any findings of the total number of prescriptions for controlled substances he had issued, the district court's reliance on the MAPS data was improper. According to Dr. Mukherjee, the district court should have based the sentence solely upon the prescriptions involved in the counts of conviction, which would have produced a total offense level of 28, with a guideline sentencing range of 78-97 months. He relies upon the Supreme Court decisions in *Apprendi v. New Jersey* , 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), and their progeny, as establishing that, in determining the sentence, the district court may not find, based on a preponderance of the evidence, facts that the jury had not found.

Dr. Mukherjee reads those cases too broadly. The limitation to jury-found facts applies only if the court imposes a guideline sentence that exceeds the

statutory or mandatory guidelines maximum. *See Booker*, 543 U.S. at 244 (stating that "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by . . . a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt") (emphasis added). This court has held that, in determining an advisory guideline sentence, a district court may find by a preponderance of the evidence additional facts not found by the jury. *United States v. Gates*, 461 F.3d 703, 707-08 (6th Cir.), *cert. denied*, 127 S. Ct. 602 (2006); *see also United States v. Cook*, 453 P.3d 775, 776-77 (6th Cir. 2000). The district court did not err in making additional findings based on the MAPS data in determining the offense level.

Dr. Mukherjee also contends that in determining his sentence, the district court failed adequately to consider the factors that 18 U.S.C. § 3553(a) states the court "shall consider" "in determining the particular sentence to be imposed," which shall be "sufficient, but not greater than necessary, to comply with" certain of those factors. The district court, however, is not required to discuss in detail each of those factors. *United States v. Gale*, 468 F.3d 929, 940 (6th Cir. 2006); *United States v. Harness*, 453 F.3d 752, 757 (6th Cir. 2006); *United States v. Kirby*, 418 F.3d 621, 626 (6th Cir. 2005). It suffices if the district court's findings show that the court considered those factors. *See United States v. Smith*, 505 F.3d 463, 467-68 (6th Cir. 2007) ("When reviewing a district court's consideration of the § 3553(a) factors, we have never required 'the ritual incantation of the factors to affirm a sentence.' To hold otherwise when the record shows adequate

proof of deliberation would effectively insert an unnecessary insistence upon formalism into the statute.").

Here the district court adequately explained the factors it considered in determining the sentence. In addition to the statements previously quoted, the court also stated that it "has carefully and thoroughly considered the - - the sentencing guidelines and has also carefully and thoroughly considered all the factors contained in Title 18 of the United States Code, Section 3553(a)." **[J.A. 2012]** The court considered but rejected Dr. Mukherjee's argument that "there should be a downward departure because of his age and health, because of his lack of a prior criminal history, and because he would suffer enough with the revocation of his medical license. And because he is a potential asset to society as a contributing member and because there is a low risk of him being a repeat offender . . . Having considered all the evidence presented to this Court, the Court finds that the defendant's offense was egregious, indeed egregious and defendant's situation does not merit any downward departure." **[J.A. 2009-10]** The court also stated that Dr. Mukherjee "has substantial medical credentials, including previous teaching positions at various hospitals and universities, however for unknown reasons, his medical practice has deteriorated drastically and ultimately he in effect became a distributor of drugs and nothing more." **[J.A. 2011]**

Finally, Dr. Mukherjee contends that the district court's imposition of consecutive sentences violated the guidelines "grouping" standard. That standard states:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. (USSG § 5G1.2(d)]

Here, the "highest statutory maximum" under the counts of conviction was twenty years, which was less than the life sentence the guidelines provided that the district court decided to impose. The guidelines thus permitted the imposition of consecutive sentences. *See Jenkins v. United States*, 394 F.3d 407, 410-12 (6th Cir. 2005) (even if counts grouped together, this does not prevent consecutive sentences under § 5G1.2); *United States v. Colbert*, 977 F.2d 203, 205-07 (6th Cir. 1992) (consecutive sentences of sixty months, sixty months, and fifteen months appropriate on separate perjury counts in order to reach the guidelines-approved sentence of 135 months); *see also*, 18 U.S.C. § 3584(b) (authorizing consecutive terms following consideration of the factors set forth in § 3553(a)). Such consecutive sentences were an appropriate method of effecting the life sentence that the guidelines authorized and the district court imposed.

C. We have considered Dr. Mukherjee's other contentions, but find them unpersuasive. We need not further discuss them.

The judgment of the district court embodying Dr. Mukherjee's convictions and sentence is affirmed.

No. 06-2412

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 06, 2009
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
MUKUNDA DEV MUKHERJEE,	)	
	)	
Defendant-Appellant.	)	

BEFORE: BATCHELDER, SUTTON, and FRIEDMAN,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon. Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, Case No. 4:04-50044
HON. PAUL V. GADOLA

v.

MUKUNDA DEV MUKHERJEE,

Defendant.

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Co-Counsel for Defendant

DEFENDANT MUKUNDA DEV MUKHERJEE'S SENTENCING MEMORANDUM

Defendant Mukunda Dev Mukherjee ("Defendant"), through his counsel, David Griem and Brian G. Shannon of Jaffe Raitt Heuer & Weiss, P.C.,

respectfully submits this Memorandum regarding issues relevant to sentencing.

INTRODUCTION

This Memorandum is intended to assist the Court in arriving at a just sentence in light of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). Sentencing is scheduled for July 5, 2006.

This Memorandum also is intended to address errors in the Presentence Investigation Report ("PSIR") prepared by Joan M. Pigott, Senior U.S. Probation Officer, especially the unconstitutional assumptions made in arriving at the aggregate drug quantities used to compute the offense level for the guideline calculations. Objections to the PSIR, previously raised by Defendant's former and current counsel, are attached and incorporated into this Memorandum (Tab A).[1] This Memorandum takes issue with portions of a document entitled " Instructions to Defense Counsel—Guideline Sentencing" (Tab B), which asserts

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[1]Defendants' former counsel, R. Vincent Green, also submitted objections to the PSIR in April. Both sets of objections raised the issue of what drug quantity should be used in calculating the base offense level under the guidelines. Tab A includes the April objections (Green's), the June objections that affect guidelines or departure in "Addendum" format, and, finally, a letter discussing factual errors that do not affect guidelines or reasons for departure.

that "the Court is not bound by the 'beyond a reasonable doubt' standard used in trial" (Tab B at 2). Under *Apprendi*, *Blakely*, and *Booker*, as discussed below, this is incorrect.

As Defendant will show, the Government's position is sheer speculation. In a nutshell, the Government's position apparently is that every prescription allegedly attributed to Defendant in the MAPS system from January 1, 2003 through June 30, 2004, was in fact (i) a prescription actually written by Defendant, (ii) for the controlled substance apparently named in the prescription at the time of submittal to a pharmacy, (iii) that was not medically justifiable under the circumstances prescribed, and in fact was a violation of the same criminal statutes at issue in this case. This is speculative with or without the 25 percent "discount" tacked on by the Probation Department. Defendant has raised this issue with the Probation Department, but must file this Memorandum before learning whether the Probation Department will revise its calculations as Defendant contends they should be revised (Tab A).

It is impossible for Defendant to respond to the speculation about drug quantities in the PSIR by complying with the "*Sentence Hearings*" section of the instructions to defense counsel (Tab B). Defendant cannot name all the patients, pharmacists, employees, MAPS specialists, handwriting experts, prescription pad thieves, forgers, and handwriting alteration experts who might have information relevant to the

disputed issue. Defendant is being asked to prove he is not guilty of uncharged and ill-defined offenses.[2]

Finally, in light of Defendant's acceptance of responsibility as reflected in Defendant's letter to this Court (Tab C), and the sentencing letters from family, friends, and others who know Defendant (Tab D), Defendant submits his sentence recommendations in this matter, based on the governing factors that inform this Court's discretion under 18 U.S.C. § 3553(a), including the sentencing guidelines. For the reasons explained below, Defendant respectfully asks this Court to depart below the guideline range in sentencing him.

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[2]This Court has directed Defendant to file his sentencing memorandum by June 17, 2006. At the same time, the Probation Department directed Defendant to resubmit his previous objections, which was done on June 15, 2006. As a consequence, Defendant must file his sentencing memorandum without knowing what the Probation Department's reaction will be to the resubmitted PSIR objections. Defendant will file a supplemental memorandum, if necessary, to address the Probation Department's forthcoming position on the resubmitted objections.

I. THE GUIDELINES, NO LONGER BINDING, ARE NOW ONE FACTOR TO BE CONSIDERED IN RENDERING A DISCRETIONARY SENTENCE

1. Summary of *Booker*, *Apprendi*, and *Blakely*

In *Booker*, the Supreme Court ruled that application of the United States Sentencing Guidelines, which the statute made binding, 18 U.S.C. § 3553(b)(1), would violate the Sixth Amendment and the Due Process Clause in any situation where they required an upward sentence adjustment based on facts not proved to the jury beyond a reasonable doubt. *Booker*; Stevens op. at 8-9. Following the rule developed in Apprendi v New Jersey, 530 U.S. 466 (2000), *Ring v Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296, 124 SCt. 2531 (2004), the *Booker* Court reaffirmed that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by [the] jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 543 U.S. at 244.

As the Supreme Court explained in *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. *Blakely* explains that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum

he may impose without any additional findings." 542 U.S. at 303-304 (emphasis in original).[3]

To remedy the constitutional violation, *Booker* made the guidelines advisory, not mandatory. *Id.*, Breyer op. at 2. The jury trial violations in *Apprendi*, *Ring*, *Blakely*, and *Booker* turned on whether the fact-based enhancements at issue, based on judicial findings instead of jury verdicts, required upward adjustment as a matter of law. *Id*, Stevens op. at 8-9.

The Court in *Booker* observed it had never found constitutional fault with a district court's exercising its broad discretion to sentence within a statutory range, *id.*, Stevens op. at 8-9, and that Congress was flee to provide true guidelines, so long as such guidelines did not bind district judges in the exercise of their discretion. *Id.*; *see also id.*, Breyer op. at 16. Accordingly, the Court severed and excised 18 U.S.C. § 3553(b)(1), the provision that required district courts to sentence within the range determined under the

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[3]*Accord United States v Davis*, 397 F.3d 340 (6th Cir. 2005), 2005 WL 130154, at *6 (6th Cir. Jan. 21, 2005) (unpublished). For an "admitted by the defendant" ease, *see United States v. Adkins*, 429 F.3d 631 (6th Cir. 2005) (defendant declined to object to the drug amount attributed to him in the PSIR). *See also United States v Murdock*, 398 F.3d 491 (6th Cir. 2005); *United States v Oliver*, 397 F.3d 369 (6th Cir. 2005).

guidelines. *Id.*, Breyer op. at 2, 16.[4] Under the remaining provisions of the Sentencing Reform Act, district courts are required to consult the guidelines, 18 U.S.C. § 3553(a)(4), (5), but the guidelines are *not* binding. *Id.*, Breyer op. at 16-17, 21-22.[5] Therefore, district courts must also consider the other factors listed in § 3553(a), and ultimately impose a discretionary sentence, within statutory limits, that is "sufficient but not greater than necessary" to serve the purposes enumerated in § 3553(a). *See* § 3553(a)(l); *Booker*; Breyer op. at 16-17 & app.

Since this Court must still consider the guidelines as one factor under § 3553(a), the Court must still perform a guidelines analysis, including resolving factual disputes by making independent determinations based on reliable evidence. However, the guideline range is no longer the binding or presumptive consideration. *See United States v. Webb*, 403 F.3d 373 (6th Cir. 2005); *United States v. Jackson*, 408 F.3d 301 (6th Cir. 2005). Instead, it is one factor to be considered among all the traditional sentencing considerations contained in § 3553(a). *See Booker* ,

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[4]The Court also severed and excised § 3742(e), which contains standards for appellate review of binding guidelines. *See id.*, Breyer op. at 16, 18; *id.*, Stevens op. at 9-10. the Court substituted an "unreasonableness" standard of review for future sentencing appeals. *Id.*, Breyer op. at 18-19

[5]*Accord Davis*, 2005 WL 130154, at *4; *United States v. Oliver*, *supra*.

Breyer op. at 16-17. The Court's discretionary sentence, rendered after considering those factors, will be reviewed only for "unreasonableness." *Id.* at 18-19.

2. The Court Should Consult, But Not Presumptively Follow, the Guidelines

Under § 3553(a), the guidelines are neither the first nor the primary consideration. The first requirement under § 3553(a) is consideration of the individual circumstances of the offense and the offender. § 3553(a)(1). The second requirement is consideration of all of the traditional purposes of sentencing: punishment, deterrence and rehabilitation. See § 3553(a)(2)(A)-(D). It appears that these traditional sentencing concerns are once again, under § 3553(a), a sentencing court's primary considerations. In the opinion of *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005), U.S. District Judge Lynn Adelman concluded that the guidelines are not presumptive, but advisory, and should be treated as one factor to be considered in conjunction with other factors that Congress enumerated in 18 U.S.C. 3553(a).

However, in *Ranum*, Judge Adelman rightly points out that the sentencing guideline provisions, and the statutory provisions under Section 3553(a) often contradict one another. For example, under Section 3353(a)(1) a sentencing court must consider the "history and characteristics of the defendant;" whereas, under the sentencing guidelines, most, if not all, of a person's background and characteristics are generally not considered. In *Ranum*, however, the Court reviewed and calculated the guidelines, but relied

heavily on the statutory authority of Section 3553(a) in imposing sentence. 353 F. Supp.2d 989-990.

In *United States* v. *Myers*, 353 F. Supp.2d 1026, 1028-1030 (S.D. Iowa 2005), U.S. District Judge Pratt agreed with Judge Adelman:

> This Court adopts Judge Adelman's view. To treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified reasons. If presumptive, the Guidelines would continue to overshadow the other factors listed in section 3553(a), causing an imbalance in the application of the statute to a particular defendant by making the Guidelines, in effect, still mandatory.
>
> * * *
>
> The guidelines prohibition of considering these factors cannot be squared with the §3553(a)(1) requitement that the court evaluate the "history and characteristics" of the defendant, the only aspect of a defendant's history that the guidelines permit courts to consider is criminal history. Thus, in cases in which a defendant's history and character are positive, consideration of all of the

> §3553(a) factors might call for a sentence outside the guideline range in imposing a sentence.

That is exactly the situation here, where Defendant's history and character for most of his 63 years has been exemplary and marked by compassion and service.

II. THE COURT MUST IMPOSE A DISCRETIONARY SENTENCE THAT TAKES INTO ACCOUNT ALL FACTORS ENUMERATED IN 18 U.S.C. § 3553(a)

After *Booker*'s invalidation of mandatory sentencing guidelines, the Court must now render a sentence under the remaining provisions of the Sentencing Reform Act. In particular, the Court must consider the sentencing factors prescribed in 18 U.S.C. § 3553(a). *Booker*, Breyer op. at 16-17 & app. The Act is very specific:

> **(a) Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> > **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established [under the guidelines];

> **(5)** any pertinent policy statement [issued by the Sentencing Commission];
>
> **(6)** the. need to avoid unwanted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> **(7)** the need to provide restitution to any victims of the offense.

The first command of § 3553(a) is that the Court impose a sentence "sufficient, ***but not greater than necessary***," to serve the purposes of sentencing enumerated in § 3553(a)(2). § 3553(a) (emphasis added).

The Court's discretionary consideration of the purposes of sentencing, as enumerated in § 3553(a)(2), is no longer limited to a sentence within the guidelines range, but instead governs the Court's entire sentencing analysis, including its selection of a sentence within statutory limits. *Booker*, Stevens op. at 8; *id.*, Breyer op. at 16-17; id., Scalia dissent at 3-4.

Thus, it appears that judges have been restored their discretion which permits them to take into account all of the circumstances of the defendant before them. § 3553(a), (a)(1).

III. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT

Applying § 3553(a), as directed in *Booker* (Breyer op. at 16-17), a Court's first and overall obligation is to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." § 3553(a)(1). Coupled with the directive to "impose a sentence sufficient, but not greater than necessary," to satisfy the purposes in § 3553(a)(2), the statute thus mandates particular and individualized consideration of both the offense and the offender. The principal effect of *Booker*, then, and the primary directive of § 3553(a), is to restore individualized sentencing of individual defendants.

Consequently, counsel for Defendant requests that the Court utilize 18 U.S.C. § 3553(a) by reviewing the following factors before imposing sentence.

(1) Defendant's age and family ties;

(2) Defendant's lack of criminal history;

(3) Defendant's education and potential utility in society;

(4) Defendant's loss of his license to practice medicine;

(5) Defendant's loss of virtually all his assets;

(6) Defendant's low risk of repeat offending; and

(7) Defendant's history and characteristics.

Attached to this Memorandum is a letter to the Court reflecting Defendant's acceptance of responsibility, his remorse for his actions, and his apology (Tab C). Defendant has lost or certainly will lose his license to practice medicine in every jurisdiction where he is licensed (some states are waiting for sentencing to take his license). Accordingly, quite apart from his remorse and the lessons he has learned from this experience, Defendant is no longer a danger to society and is highly unlikely to reoffend. *See United States v. Ranum*, *supra*.

This Court was present during the trial and already knows a great deal about the nature and circumstances of the offense, as revealed by the evidence. What may remain unclear to the Court is why someone like Defendant would offend as the jury found he did. A closer look at Defendant's history and character helps to explain, if not excuse, the conduct of which he has been convicted.

Defendant, now 63, was born in 1942. He moved to England in 1960, sponsored by his eldest brother, a medical physicist named Sib Nath Mukherjee (known as "Dada," a title of respect in India). Defendant

earned his MD in 1966 from Newcastle King's College, University of Durham, and interned and did his first residency in the U.K. before moving to the United States in 1968.[6] Defendant's other brother, Nrisingha ("Nisu") Mukherjee, is a retired thoracic and cardiovascular surgeon who lives in Pasco County, Florida. Dada is 90; Nisu is 76. They are the founders of the Mukherjee Brothers' Foundations, educational foundations in Lincoln, England and Pasco County, Florida They both were profound formative influences for Defendant, shaping aspects of his character that shed light on the issues before this Court, including his tendency to trust others too readily and unquestioningly. This is explained well in a letter to this court by Martin E. Rice, a Florida lawyer who sits on the Board of the Mukherjee Brothers' Foundation and who is an advisor to Nisu:

> Sib Nath and Nrisingha are amazing people. They have no doubt had a profound effect upon the thinking of their younger brother, Mukunda. . . . Sib Nath is truly a remarkable person; to be around him is to feel the presence of greatness. Sib Nath has deep roots in

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[6]The PSIR correctly notes that Defendant received his medical degree in 1966 in England (¶53), but incorrectly states that he studied only two years in England (145). Defendant's counsel have pointed out errors of this kind, which do not directly affect guideline or departure issues, in a letter to this Court (included in Tab A).

several famous political and charitable movements in India. I understand that he was involved with Gandhi in the non-violent protest that led to India's freedom and he was instrumental in making significant gifts to Mother Teresa's charity in India. Sib Nath's lifelong search for enlightenment, and his avoidance of confrontation has however left him vulnerable in one respect, and that is he tends to place blind trust in others.

. . . Nisu is the principal founder of the Mukherjee Brothers' Foundation Nisu lives in a small condominium that he purchased several years ago for roughly $25,000.00. The balance of his earnings and assets with the exception of minimal expenses to sustain himself and contributions towards the educations and support of others, have gone to, or will go to, the Muiherjee Brothers' Foundation. Like Dada, Nisu's philosophy of life is that of peace, learning, non-violence and charity. He also tends to place unquestioned trust in others. (Tab D, first letter, Martin Errol Rice to Judge Gadola, dated June 5, 2006)

Other letters to the Court bear out an assessment of Defendant as a gentle, generous, trusting man, much like the brothers he has always looked up to Michael Redman, the Jail Administrator

for the Sanilac County Jail, where Defendant has resided the last two years, describes him as a "model inmate," obedient and cooperative and able to get along well with the officers (Tab D, third letter, dated May 9, 2006). Doctor Maurice Edward Keenan, a pediatrician and teacher associated with Massachusetts General Hospital and Harvard Medical School for 40 years, has known Defendant since he first came to the United States in 1968. He describes Defendant as "effective at patient care," "cheerful and dependable," and "a compassionate and trusting physician" (Tab D, fourth letter, dated June 5, 2006; emphasis added).[7]

Santimoy Banerjee, a PhD biochemist, and his daughter Kumarika Banerjee, a newly graduated medical doctor, have provided this Court with similar insights into Defendant's character (Tab D, fifth and sixth letters, dated June 2 and June 1, 2006, respectively). Santimoy has known Defendant since 1969, shortly after his arrival in the United States. Kumarika has known Defendant as a close family friend her entire life. Both of them speak eloquently of his kindnesses to them and others. When Santimoy had to make an emergency trip to India in the 1980s,

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[7]Defendant's current counsel are not sure what letters this Court already has received, and so in some instances has asked character references like Dr. Keenan to write again, to ensure that at least one letter is received. Dr. Keenan's first letter was dated March 14, 2006. The June 5 letter included in Tab D amplifies on that earlier letter.

Defendant took the rest of the Banerjee family into his own home until Santimoy's return. Santimoy writes of Defendant's charitable instincts, so similar to his brothers. Kumarika writes of Defendant as a typical "absent-minded professor," unconcerned with matters of personal appearance, a bit eccentric, but good-hearted, humble, and modest. She describes him as a "Good Samaritan," always willing to help others in need, and to work long into the night to accommodate those who could not see him during the day.

Similarly, Mrs. Chris Reardon, who has known Defendant personally for 25 years, and who also is well acquainted with his brother, Nisu, testifies to Defendant's skill and compassion as a physician, and his dedication to others and to constructive social projects (Tab D, seventh letter, dated June 2, 2006). Following a career in medicine, Mrs. Reardon now works as a private investigator. Another long-time friend of Defendant, Dr. Lakshmi Natarajan, a specialist in nephrology, agrees that Defendant still has much to contribute to the community:

> I know that he has been going through a difficult time for the past several years. While this in no way excuses any actions he may have taken, I hope that you will consider his life as a whole when you ate making what must be a tough decision for you as a judge and as a human being.
>
> He and his family have helped many people in both the United States

> and in India. He has given his time generously to his patients and to the individuals in his life. I feel strongly that he could still give back to the community in a meaningful way if just given the chance. (Tab D, eighth letter, dated June 5, 2006; emphasis by Dr. Natarajan)

In an earlier letter, Dr. Gangaiah Natarajan and Dr. Lakshmi Natarajan had echoed others in describing Defendant as "simple, good hearted, trusting and supportive of fellow humans," noting also the Mukherjee family's gifts to Mother Teresa (Tab D, ninth letter, dated February 18, 2006). Like Santimoy Banerjee and Chris Reardon, Dr. Ahmed M. Akl, Chairman of the Radiation Oncology Department at Hurley Medical Center in Flint, described Defendant as "an excellent physician" (Tab D, tenth letter, undated). Dr. Tarak N. Paul, who has known Defendant for 30 years, tells this Court that Defendant was dedicated to his patients and regarded them as family members (Tab D, eleventh letter, June 3, 2006). Defendant's patients also described him as compassionate and genuinely concerned about their welfare (Tab D, twelfth letter, Ms. Cooper, dated March 28, 2006). Patient Sue Burns was "impressed with him as a doctor" and "found him to be a very compassionate physician" (Tab D, thirteenth letter, dated April 30, 2006).

All of the foregoing is intended to give this Court an appreciation of the Defendant's personal history and characteristics. Also relevant to the Court's sentencing analysis is the issue of Defendant's health.

The PSIR discusses Defendant's health in paragraphs 50 and 51. In addition to the high cholesterol, hypertension, coronary artery disease and depression listed in those paragraphs, Defendant has been diagnosed at the Sanilac County Jail with diabetes mellitus, and is receiving medication and a special diet for this ailment. He has a significant family history for heart disease and stroke, as recounted by his brother, a thoracic and cardiovascular surgeon, in a letter to this Court:

> Our father, I mentioned, died of coronary artery disease. Our mother died of stroke in 1981 Two cousins on Mukun's father's side died suddenly while still young, between 40 and 50, despite being treated by a cardiologist. I had a massive heart attack at the age of 55, while operating. I was on a heart pump and pacemaker for five days in 1986 I had a second heart attack in 1988 and six years ago I had quadruple coronary bypass surgery. Just recently I had a small stroke and some blockage that required balloon angioplasty and insertion of four stents. This family history is a strong indicator that Mukun is at risk for coronary disease, symptoms of which he already displays. (Tab D, second letter, Dr. Nrisingha Mukherjee to Judge Gadola, dated June 9, 2006)

Under 18 U.S.C. § 3553(a), this Court should consider Defendant's age and health status in imposing

sentence This Court also should consider that he is a gentle, trusting, educated man who has been and will be significantly punished by the loss of his medical license, which not coincidentally will reduce the risk of repeat offending to virtually zero. Defendant also has been punished by more than two years of incarceration already, a very unusual circumstance in cases of this kind. His wife is divorcing him. His financial condition, always modest, is ruined. He is able to retain counsel only through the charity of his brother Significantly, Defendant not only has the moral and financial support of his elder brothers, he has prospects for a useful life serving the Mukherjee Brothers' Foundation. Defendant submits that these circumstances combine to warrant a downward departure from the guideline range. Before discussing what sort of departure would be appropriate, however, Defendant first must clarify what the guideline range starting point should be.

IV. THE PRESENTENCE INVESTIGATION REPORT COMPUTES THE OFFENSE LEVEL ON THE BASIS OF SHEER SPECULATION, WHICH IS IMPERMISSIBLE UNDER *BOOKER*, *APPRENDI*, AND *BLAKELY*

1. Base Offense Level

The Probation Officer based her calculations of drug quantities on an exhibit prepared by the Government entitled "MUKUNDA MUKHERJEE SENTENCING CALCULATION USING MAPS TOTALS (calculated 1-3-2006)" and filed in this record

as Document 69 on January 13, 2006 The Government mailed a lengthy letter to Ms. Pigott on February 23, 2006 (Document 90-2), with exhibits A through Z.. Attachment 5 to Exhibit Z is a chart created by the Government from MAPS data (Michigan Automated Prescription System), and this Attachment 5 apparently corresponds to Document 69. It is not evidence. MAPS data, as the Count knows, is a raw record of prescriptions submitted to pharmacies. It does not distinguish between proper prescriptions and improper prescriptions, between real prescriptions and forgeries, between prescriptions as written and prescriptions as presented after alterations, etc.

The Government-prepared Exhibit Z is not even the MAPS data itself; but rather a recasting of that data, said to run from January 1, 2003 to June 30, 2004, into the marijuana equivalent for each pill, tab, or milliliter allegedly prescribed by Defendant. The Court will recall that it limited the MAPS-related testimony at trial, and that it is impossible to get from the evidence at trial to the conclusions drawn by the Government in Exhibit Z.

Even Ms. Pigott recognized this in the Presentence Investigation Report. Rather than using the drug quantities associated with the counts on which Defendant was found guilty, however, Ms. Pigott simply piled another assumption on top of the myriad assumptions underlying Exhibit Z. She attached Exhibit Z to her Report, but decided to err "on the side of caution" by arbitrarily reducing the quantity by 25 percent "to give the defendant the benefit of any doubt" (PSIR at 7, ¶ 17). This 25 percent figure recognizes

that any conclusions drawn from Exhibit Z are speculative and unconstitutional under *Booker*, *Apprendi*, and *Blakely*, but the 25 percent figure itself is equally speculative and suffers from the same constitutional infirmity.

Defendant was convicted by a jury of illegal prescriptions representing a marijuana equivalent of 98.29 kilograms. Defendant arrived at this figure by beginning with an exhibit prepared by the Government, showing a total equivalent of 115 kilograms of marijuana, reflecting all of the undercover buys and charged counts (Tab E). Defendant then subtracted the drug amounts based on the acquitted counts to leave 98.29 kilograms, the total amount derived from the guilty counts (Tab F). The detailed calculations are included in Tab A, Addendum, Controverted Item #1.

This Court cannot accept the PSIR's conclusion that the offense level should be premised on a conjectural 26,463.409 kilograms of marijuana equivalent. Speculation of this kind now is clearly unconstitutional. Defendant submits that the base offense level should be determined by using the marijuana equivalent of the thug amounts involved in the counts as to which the jury concluded that the Government had proved its allegations beyond a reasonable doubt. That amount again is 98.29 kilograms, and it yields a base offense level of 24 2D1.1(c)(8).

2. Adjustment for Role in the Offense—Aggravating Role

Ms. Pigott added three levels on the theory that "defendant was the manager or leader of a criminal activity involving five or more participants," relying on 3B1.1(b) (PSIR at 8 ¶30) Defendant submits that it would be more appropriate to add two levels under 3B1.1(c), because the criminal activity of which he was convicted was essentially a solo operation. He was the doctor, and it was he who wrote the illegal prescriptions. His employees were peripheral to this criminal activity, and to the extent that they may have engaged in taking money to shorten waiting times or stealing prescription slips or samples from Defendant, they did so without Defendant's knowledge and certainly without his management or supervision 361.1(b), used by Ms. Pigott, should be reserved for larger and more organized criminal enterprises.

3. Adjustment for Role in the Offense—Abuse of Position of Trust or Use of Special Skill

Ms. Pigott added two levels on the theory that "defendant used a special skill to facilitate the offense and abused a position of trust." Defendant accepts responsibility for these two levels. As he explained to this Court in his letter (Tab C), he deeply regrets having prescribed controlled substances inappropriately.

4. Adjusted Offense Level (Subtotal)

For the reasons outlined above, Defendant respectfully submits that his adjusted offense level should be 28, and not the 41 calculated in the PSIR.

5. Acceptance of Responsibility

Although Defendant has accepted responsibility for his offenses (Tab C), the PS1R does not recommend a reduction because "defendant put the government to its burden of proof at trial" (PS1R at 9, ¶34). Although Defendant's acceptance of responsibility satisfies Application Note 1(a), Ms. Pigott's determination is consistent with Application Note 2. While the Court is not required to reduce the offense level, it may and should take Defendant's acceptance of responsibility into account when fashioning a sentence under 18 U.S.C. § 3553(a).

6. Total Offense Level

For all the foregoing reasons, Defendant's total offense level is 28, not the 41 calculated in the PSIR.

7. Guideline Imprisonment Range

The PSIR, using a total offense level of 41 and a criminal history category of I, calculated a guideline imprisonment range of 324 to 405 months. Defendant, using a total offense level of 28 and a criminal history category of I, calculates a guideline imprisonment range of 78 to 97 months. Defendant respectfully asks

this Court to impose a sentence significantly shorter than 78 months, as discussed below.

V. REASONS FOR DEPARTURE

Defendant, who is 63 years old, has been gainfully employed and/or a student for all of his teenage and adult years. He has no prior criminal history and because of this offense, his medical career is at an end.

Defendant's personal history, supported by the numerous letters from family, friends, medical associates, patients and community members, has provided the Court with a picture of his background, education, employment record, family responsibilities, and civic contributions.

This Court has seen a snapshot of Defendant's medical career at its very nadir. It was not always thus, as the Court can see from the sentencing letters submitted (Tab D) the events that led Defendant to the vulnerable state he was in when the undercover agents presented themselves to him in 2004 and described their pain, were relatively recent. Defendant does not seek to excuse his conduct with the officers. But the raw MAPS statistics do not portray an accurate picture of intentional misconduct over an 18-month period, because the statistics include properly prescribed prescriptions, prescriptions altered by patients to add controlled substances to otherwise nonoffending prescriptions, outright forgeries that resulted from mere negligence in controlling access to prescription pads, and so on. Defendant cannot and does not accept

responsibility for the 26,463 kilograms of marijuana equivalent used in the PSIR, and respectfully objects to having his sentence based on this number.

Defendant does acknowledge that he is responsible for medical practices that facilitated the dispensing of controlled substances to persons who were not entitled to receive or use those substances. Although that constituted serious wrongdoing, it should be counterbalanced by the Defendant's otherwise unblemished record and the unlikelihood of reoffense.

A review of the letters to this Court give ample testament to Defendant's long-standing good character and his strong ties to numerous friends and family members.

In sentencing Defendant, we respectfully request that the Court take into serious consideration the stress and anxiety he has experienced over the last 24 months spent in a county jail, his good character and poor health, the submitted letters to the Court, his education and work record, his lack of any prior criminal history, the forfeiture of assets to the Government and the further financial effects of his pending divorce, and his strong ties and commitments to his brothers.

As noted above, the correct guideline range for Defendant is 78 to 87 months, and not the 324 to 405 month range calculated by the Probation Officer. It is certainly not the life sentence calculated by the Assistant U.S. Attorney, who before trial offered

Defendant a sentencing range of 70 to 87 months. The Assistant U.S. Attorney asked the Probation Officer to recommend a 40-year sentence for this 63-year-old Defendant, and no doubt will ask this Court for that sentence.[8] That would be a heavy price indeed to pay for exercising the right to trial. Again, under §3553(a), this Court's primary task in sentencing is to impose a sentence "sufficient, but not greater than necessary," to serve the purposes of sentencing enumerated in the statute and discussed at length earlier.

Although the Sanilac County Jail is an excellent jail facility, it is "hard time" in the sense that no jail can offer the freedom of movement or the facilities and programs found in prisons. The time that Defendant

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[8]Assistant U.S. Attorney Mark Jones recommends that the twelve 20-year counts of which Defendant was convicted be divided into two groups of six each, with the 20-year sentences for each group to run consecutively, for a total of 40 years (Docket No. 90-2 at page 14). This is said by Mr. Jones to be appropriate under USSG §5G1.2(d). Such a grossly inhumane sentence would be inappropriate on every conceivable level, but as a starting point, the appropriate Guideline provision is not §5G1.2(d); rather, this is a grouping issue under §3D1.1 and §3D1.2. Under those provisions, grouping of closely related counts in drug offense cases leads to a single combined offense level . This appears to be what the Probation Department has done, albeit with an incorrect drug quantity.

has served in jail, all things considered, is sufficient punishment for his offense under §3553(a). Defendant respectfully requests that this Court depart downward from the range of 78 to 87 months and sentence him to the time he will already have served as of the date of sentencing—over two full years. In addition, of course, Defendant will forfeit $169,340.15 already seized by the Government. This is a relatively modest departure from the guideline range (and the range acceptable to the Assistant U.S. Attorney before trial), considering that Defendant has been and would continue to be a model prisoner, earning a maximum reduction in time. Under §3553(a), no greater punishment is necessary in this case.

VII. CONCLUSION

Defendant's status as a first time, non-violent offender, who has very supportive brothers and life-long friends, strongly suggests that a lengthy sentence of confinement, beyond the two years already served, is not necessary for punishment or deterrence in this case. Because there is virtually no risk that Defendant will reoffend, and in light of what he has lost already, a sentence far more lenient than that suggested by either the Assistant U.S. Attorney or the Probation Department will be sufficient to serve punitive, deterrent and incapacitative purposes in the unusual circumstances of this case.

This Court has the discretion to impose any sentence it determines is appropriate, including a sentence that matches the period of incarceration Defendant already has served. In this case the loss of

his medical career, his financial ruin, as well as the label of a felony conviction itself; are all sufficient deterrents to others who might be tempted to commit the charged offenses. Considering Defendant's poor health, as well as his personal characteristics and the value he could still contribute to society if not incarcerated, a sentence that is "sufficient, but not greater than necessary" under §3553(a), should be a lenient one.

For all of the foregoing reasons, counsel for Defendant respectfully urge this Court to impose a sentence of time served.

s/ David Griem
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Dated: June 16, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Case No. 04-CR-50044-FL-01

Plaintiff,

vs. **HON. Paul V. Gadola**

MUKUNDA DEV MUKHERJEE, M.D.,

Defendant.

CERTIFICATE OF SERVICE

Celeste E. Kelley hereby certifies that she is employed by the firm of Jaffe, Raitt, Heuer & Weiss, P.C., and that on June 16, 2006, she electronically filed **Defendant Mukunda Dev Mukherjee's Revised Sentencing Memorandum with Exhibits** and this Certificate of Service with the Clerk of the Court using the ECF system which will send notification of such filing to the following counsel of record, at the addresses listed below:

Robert S . Hackett
P.O. Box 3514
Grand Rapids, MI 49501

Mark C. Jones, AUSA
210 Federal Bldg.
600 Church St.
Flint, MI 48502

David Griem
500 Griswold Ave , Ste 2400
Detroit, MI 48226

And I hereby certify that I have mailed by U S Postal Service the paper to the following non-ECF participant at the address listed below:

R. Vincent Green
1300 N. Waverly Rd., Ste. 7
Lansing, MI 48917

s/ Celeste E. Kelley
CELESTE. E. KELLEY

HARVARD MEDICAL SCHOOL

MASSACHUSETTS GENERAL HOSPITAL

[SEAL]

MAURICE EDWARD KEENAN, M.D.
Assistant Professor of Pediatrics

CHILDREN'S SERVICE
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June 5, 2006

Honorable Paul V. Gadola
United States District Court Judge
600 Church Street, Room 140
Flint, MI 48502

Re: Mukunda Mulcheijee

Dear Judge Gadola:

I am a pediatrician and a teacher. I have been associated with the Massachusetts General Hospital and Harvard Medical School for forty years.. In 1995-96 I was elected president of the American Academy of Pediatrics.

I came to know Dr. Mukunda Mukherjee when he was a senior resident in pediatrics at the Massachusetts General Hospital. He was effective at patient care and he was cheerful and dependable. Dr. Mukherjee completed his residency at Massachusetts General Hospital and pursued studies in nutrition at Massachusetts Institute of Technology. His family was growing at this time, soon to be completed with a third child. His wife Sally, who grew up in a Boston suburb,

was supportive of his energetic pursuit of a fine medical career.

In the years after leaving Boston, Dr. Mukherjee and I would see each other at the annual meeting of the American Academy of Pediatrics. I was supportive of his career and over the years wrote several letters of support for his academic advancement. He achieved the rank of Associate Professor of Family Practice and Pediatrics at North Dakota University in 1976. Between 1978-84 he was Director of Research at Dayton Ohio Medical School. He held the post of Director of Public Health in Lincoln, Nebraska and by 1996 was Clinical Professor of Emily Practice\Pediatrics and Nutrition at Michigan State University. In 1999 Dr. Mukherjee entered private practice in Flint, Michigan. Dr. Mukherjee has always maintained his fellowship in the American Academy of Pediatrics and the American Academy of Family Practice.

Dr. Mukherjee is a compassionate and trusting physician. I feel that the qualities I admire in him were partially responsible for the unfortunate trust he had in the people around him. Dr. Mukherjee went out of his way to be kind to those in need. Generous to a fault he put others before himself. I hope you will consider his good works and character. He will continue to be a good and compassionate citizen. His values will always be a part of my deep regard for his character.

I plead for your compassion in sentencing this gentle person who has been physically weakened

through the stress of this trial. At present Dr. Mukherjee is being treated for hypertension and has developed diabetes mellitus type H for which he takes oral hypoglycemics. Other medications include Welbutrin to deal with his depressed mood

I plead for a lenient decision in view of his precarious health.

Very truly yours

s/ Maurice E. Keenan, M.D.
Maurice E. Keenan, M.D.